

(2)  
No. 91-451

Supreme Court, U.S.  
FILED

~~OCT 28~~ 1991

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IN THE  
**Supreme Court of the United States**  
October Term 1991

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ROBERT MCKIM NORRIS, JR.,

*Petitioner,*

v.

THE ALABAMA STATE BAR

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF ALABAMA

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PETITIONER'S SUPPLEMENTAL BRIEF IN  
SUPPORT OF THE PETITION FOR CERTIORARI

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October 28, 1991



## QUESTIONS PRESENTED FOR REVIEW

1. Whether an attorney who sends, by messenger rather than by mail, a truthful, non-deceptive and non-misleading written communication to a prospective client, can be disciplined for doing so without violating his First Amendment right to free commercial speech, even though neither the attorney, his messenger, nor any other representative ever had any personal contact with the recipient of the written communication.

2. Whether the Alabama Supreme Court violated Petitioner's right to fair notice of prohibited conduct when it acknowledged that Disciplinary Rule 2-103 did not on its face prohibit the conduct with which Petitioner was charged but nonetheless suspended Petitioner's license to practice law because it found that he had violated the "purpose and spirit" of the rule while announcing that purpose and spirit for the first time in the case at bar.

3. Whether Alabama Disciplinary Rule 1-102(A)(6), which prohibits "any other conduct which adversely reflects on his (an attorney's fitness to practice law," is so vague as to deprive Petitioner of his Due Process right to fair notice of what it actually forbids.

4. Whether the Due Process Clause of the Fourteenth Amendment requires that the discipline imposed on one attorney be approximately proportional to the discipline imposed on other attorneys in the same jurisdiction for the same or similar offenses committed under the same or similar circumstances.



## TABLE OF AUTHORITIES

## Cases

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## Rules of Court

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In Issue No. 3, Petitioner raises a Due Process challenge to the vagueness of Alabama Disciplinary Rule 1-102(A)(6).

As noted in the Petition for Certiorari,<sup>1</sup> New York has an identical rule. The constitutionality of that rule is now being challenged in a petition for a writ of certiorari to the Court of Appeals of New York. See *Elizabeth Holtzman v. Grievance Committee for the Tenth Judicial District*, No. 91-401, filed on September 9, 1991. The *Holtzman* petition is scheduled for decision on November 1, 1991.

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<sup>1</sup>See page 10, footnote 4.

*Holtzman* and the case at bar each raise the same vagueness challenge to DR1-102(A)(6). Both cases involve a regulation prohibiting either speech or conduct which "adversely reflects" on one's fitness to practice law and in both cases the lower courts used that rule to punish unpopular speech. Finally, both cases are governed by *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (June 27, 1991).<sup>2</sup>

In *Gentile*, the Court struck a Nevada disciplinary rule on vagueness grounds, noting in Part III of Justice Kennedy's opinion that:

[T]he right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.

So, too, in the case at bar. Like beauty and normalcy, adverse reflections are in the eye of the beholder.<sup>3</sup> These reflections have no "settled usage or tradition of interpretation in law." *Id.*

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<sup>2</sup>The case at bar was decided before *Gentile* was handed down. The Alabama Supreme Court issued its opinion on March 29, 1991, and denied rehearing on June 21, 1991. Although *Holtzman* was decided four days after *Gentile*, the timing was so close that the New York Court of Appeals had no opportunity to consider it.

<sup>3</sup>For example, before this Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350(1977), the prevailing opinion among lawyers, reflected in the ABA Model Code of Professional Responsibility adopted by all fifty states, was that advertising by lawyers "adversely reflected" upon their fitness to practice law and was therefore subject to punishment.

There are no cases, in Alabama or elsewhere, which provide Petitioner or any other lawyer with the slightest clue as to what speech or what conduct will, in the eyes of officialdom, “adversely reflect upon his fitness to practice law.” Each case of “adverse reflection” thus becomes one of first impression for the accused, the disciplinary prosecutor, the disciplinary board and the reviewing court.

Such imprecise regulations raise a very “real possibility” of discriminatory enforcement. *Id.* at 111 S.Ct. 2732. This possibility alone is sufficient to strike a regulation on vagueness grounds because, at least in First Amendment cases, it forces attorneys who wish to continue practicing law to engage in massive self-censorship.

To please disciplinary officials and avoid the agony and risk of a disciplinary trial, most attorneys will steer well away from controversy. Indeed, this is precisely what the Supreme Court of Alabama intended when it stated that “DR-102(A)(6) clearly puts an attorney on notice to *exercise great discretion* so as not to engage in conduct that would adversely reflect on his fitness to practice law.” (Slip. Op. at P.7, App. A at page 24) (emphasis added).

Requiring attorneys to exercise “great discretion” in speech and conduct is a constitutional vice because it freezes thought, speech, and action and forces attorneys into officially approved molds, to the immense detriment of their clients and society at large. *Gentile*, at 111 S.Ct. 2732.

## CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, the Court should issue a writ of certiorari to the Supreme Court of Alabama to review its decision in the instant case.

Respectfully submitted,

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